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GUIDANCE ON IMPLEMENTATION OF THE
REVISED STATUTORY LIMITS ON REMOVAL ACTIONS

1. INTRODUCTION

Section 104(e) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) amends section 104(c) of CERCLA to raise the statutory limits on removal actions. In addition, SARA provides for an additional waiver of these limits where continued response action is appropriate and consistent with the remedial action to be taken. This guidance document explains these new provisions and describes the appropriate procedures for implementing them. Section 2 addresses the revised limits and Section 3 addresses the new consistency waiver. This document should be used in conjunction with the general removal procedures described in the Superfund Removal Procedures -- Revision Number Two, August 20, 1984, or, as may be amended.

2. INCREASED STATUTORY LIMITS

Section 104(e) of SARA raises the statutory limits on removal actions from \$1 million and six months to \$2 million and 12 months.

2.1 Delegation of Authority

The Administrator has delegated the authority to approve removal actions under the new limits in the following manner:

Non-NPL Sites

- a. The Regions are delegated the authority to approve removal actions costing up to \$2 million, but Headquarters (HQ) retains concurrence for actions of "national significance" or actions which are precedent-setting. Concurrence procedures and the definition of nationally significant actions will be set forth in future OSWER directives.
- b. HQ retains approval of removal actions costing more than \$2 million. An exemption request must be based on the three "emergency" criteria in the original Superfund law.
- c. The Regions are delegated the authority to approve actions of any duration, including those that require an exemption to the 12 month limit.

Proposed/Final NPL Sites

- a. The Regions are delegated the authority to approve removal actions costing up to \$2 million.
- b. HQ retains approval of removal actions costing more than \$2 million, where the exemption request is based on the three "emergency" criteria in the original Superfund law.

- c. The authority to approve actions costing more than \$2 million, where the exemption request is based on the new consistency waiver discussed in Section 3, will generally be retained by HQ, but may be delegated to the Regions on a site-by-site basis.
- d. The Regions are delegated the authority to approve actions of any duration, including those that require an exemption to the 12 month limit.

2.2 Determination of Limits

For purposes of tracking removal actions with respect to the statutory limits, existing procedures should be followed. To track the 12 month limit, the start and completion dates of removal actions must be determined in accordance with current EPA policy. The time limit for an individual removal action shall expire 12 months from the start date, which is the date on-site removal work begins. If more than one removal has been undertaken at the same site, the sum of the time expended for all the removals at the site will count against the 12 month limit.

The \$2 million limit applies to all obligations from the Fund associated with the removal action as specified in the Superfund Removal Procedures ("Allowable Costs for Removal Actions"). If more than one removal has been undertaken at the same site, the sum of the total project costs for all the removals at the site will count against the \$2 million limit. Enforcement costs and section 104(b) activities conducted by EPA or any other Federal agency do not count toward the \$2 million limit.

2.3 Indicators of the Need for a Statutory Exemption

Whenever possible, the On-Scene Coordinator (OSC)* should identify the need for a statutory exemption at the start of the removal action. Such early planning can improve the efficient allocation of Regional resources, and can avoid added costs and delays that might occur if on-going site work had to be suspended while awaiting approval of an exemption request.

If the need for a statutory exemption was not anticipated at the start of the action, the OSC should review the status of removal activities and site conditions to determine if there will be a need to request a waiver of the 12 month or \$2 million limit in each of the following cases:

- a. When a total of \$1.6 million has been obligated for commercial cleanup contracts at a site;
- b. When 9 months have elapsed since the start of the removal action;

*Or Remedial Project Manager (RPM), as appropriate. For non-time-critical removal actions at NPL sites that are remedial-lead projects, the RPM should be substituted for the OSC in references throughout this guidance document.

- c. When an estimate has been received from a contractor that exceeds either 12 months/\$2 million; or
- d. If at any earlier time during the removal action, the OSC believes that the 12 month/\$2 million limits will be exceeded.

Once the OSC has knowledge that the statutory limits may be exceeded for project completion, the OSC must prepare an Action Memorandum for a statutory exemption request. (See Section 2.4.) The OSC should notify the Emergency Response Division (ERD) as soon as it appears that a \$2 million exemption request is necessary. Such notification will help to expedite the Headquarters exemption approval process. As noted in Section 2.1 above, for exemption requests based on the new consistency waiver at proposed and final NPL sites, OSWER may delegate approval authority to the Region on a case-by-case basis.

2.4 Documentation and Coordination Procedures

For removal actions that will not exceed the statutory limits, a standard Action Memorandum should be prepared that demonstrates how the site meets the removal criteria established by section 300.65 of the current National Contingency Plan (NCP). (See the Superfund Removal Procedures for information on the preparation of Action Memoranda.) Coordination with Regional enforcement and remedial personnel should be conducted as appropriate.* Headquarters concurrence will be required prior to initiating removals at non-NPL sites which are precedent-setting or of national significance.

For removal actions that initially or ultimately exceed the statutory limits, an Action Memorandum for a statutory exemption request must be prepared. The exemption request must cite the statutory criteria for extending the limits and demonstrate how the criteria are met by site conditions. Again, coordination with Regional enforcement and remedial personnel should be conducted as appropriate. Coordination with Regional Counsel must also be carried out to ensure that the legal findings are adequately demonstrated. Section 3 of this guidance document explains how to use the new waiver of the statutory limits available under SARA. If an exemption request will be based on the new consistency waiver, follow the additional documentation instructions in Section 3.6.

3. NEW WAIVER TO THE STATUTORY LIMITS

Under the original CERCLA, removal actions had to meet three criteria to be granted an exemption to the statutory limits: 1) continued response actions are immediately required to prevent, limit, or mitigate an emergency; 2) there is an immediate risk to public health or welfare or the environment; and 3) such

*For remedial-lead removal actions, the RPM should coordinate activities with Regional removal personnel and obtain removal program concurrence on the Action Memorandum. In accordance with Superfund Removal Procedures, OSCs and Regional enforcement personnel should coordinate efforts to identify and compel potentially responsible parties to perform removal actions.

assistance will not otherwise be provided on a timely basis. Section 104(e) of SARA adds a fourth, independent criterion that allows removal actions to continue beyond the 12 month/\$2 million limits if "continued response action is otherwise appropriate and consistent with the remedial action to be taken." Because this fourth criterion is independent of the other three, a waiver may be granted if a removal action satisfies either the first three tests, or the fourth test alone.

3.1 Applicability

This new exemption is available only at proposed and final NPL sites. The original "emergency" waiver will continue to be available at all sites.

3.2 Purpose

The primary purpose of this provision is to enhance EPA's ability to choose the most effective response mechanism -- removal or remedial -- at proposed and final NPL sites. This waiver allows EPA to implement an operable unit of a remedial action where a removal action is the most appropriate approach, but the time or funds necessary to perform a thorough removal response will exceed the statutory limits. By increasing EPA's flexibility to initiate a response action quickly using removal authority, the waiver can improve efforts to contain and control hazardous substance releases, increase the protection of public health and the environment, and decrease total response costs.

It is important, however, that this waiver be used judiciously because State cost-sharing is not required for removal actions. The objective of the waiver is to increase the efficiency of Superfund responses, not to circumvent State cost-sharing requirements. In general, therefore, use of the waiver should be limited to removal actions that exceed the \$2 million limit by a reasonable amount, unless a compelling reason exists to perform a more expensive removal.

3.3 Definition of "Otherwise Appropriate"

Use of this waiver to extend a removal action is "appropriate" in three situations: 1) to mitigate a near-term threat; 2) to prevent further migration; or 3) to ensure an efficient response. To some extent, these objectives are interrelated and if an action meets one requirement, it may also satisfy a second or third.

To mitigate a near-term threat. At some sites, a threat may not constitute an emergency, but will require a response over \$2 million/12 months that is more rapid than a remedial action. For example, the presence of hazardous substances in intact drums may not present an immediate threat, but early removal of the drums can eliminate the possibility of leakage or spillage as drums deteriorate in the time period before long-term remedial cleanup begins. Hazardous substances on the surface of a site may often be candidates for early treatment/disposal at proposed and final NPL sites to reduce the potential for human exposure and environmental damage.

To prevent further migration. A removal action that exceeds the statutory limits may be appropriate if needed to contain hazardous substances before they migrate to larger areas and cause more extensive contamination. The excavation of contaminated soil is a typical removal action designed to both eliminate a direct contact threat and to prevent further migration of contaminants. Capping and installation of drainage controls/containment barriers are other examples of removal actions to reduce contaminant migration.

To ensure an efficient response. It may be more efficient and economical in some cases to take additional steps as part of an early removal action rather than wait for long-term remedial cleanup. Such steps can avoid the need for removal restarts. For example, if a lagoon containing hazardous substances is close to overflowing, a removal action could be conducted to either lower the freeboard or completely drain the lagoon. Although lowering the freeboard is the less expensive removal option and addresses the immediate threat, heavy rains may cause the lagoon levels to rise again and require a removal restart. Draining the lagoon might therefore be a more efficient and economical response in the long run because removing the hazardous substances eliminates the possibility of a recurring threat.

Contaminated soils provide another example of site conditions which may warrant a removal action that exceeds the statutory limits to improve response efficiency. If a removal action is required to eliminate a threat from highly contaminated soils, but the site also contains a limited area of low-level soil contamination, it may be more efficient to address all contaminated soil at one time as part of a removal action.

A final example of a situation where the waiver may be used to accomplish a more efficient response is when a removal action over \$2 million/12 months is needed to implement an alternative technology. Alternative technologies are often more time-consuming and costly than land disposal, but they can also provide permanent destruction of wastes, thus accomplishing a more complete response. For all removal actions, however, the selection of a removal technology must be justified based on a variety of factors, including technical feasibility, cost, effectiveness of threat mitigation, etc.

To obtain an exemption to the statutory limits based on this new waiver, the removal action must be found "appropriate" under at least one of the three situations described above.

3.4 Definition of "Consistent"

"Consistent" is defined in its broadest sense and may be characterized as a range of possible approaches. At one end of the spectrum, removal actions may be found consistent if they do not hinder or interfere with the remedial action to be taken. At the other end of the spectrum, removal actions may be found consistent because they contribute in a positive way to the long-term cleanup plan. For example, a removal action to provide carbon filters to homes with contaminated drinking water as an interim measure would not interfere with a long-term remedial plan to clean up the contaminated aquifer. A removal action to solidify sludge could, however, hinder a long-term plan to incinerate the waste and should, therefore, be avoided if other

approaches are feasible. A removal action to remove surface drums from a landfill could contribute in a positive way to a remedial plan to clean up the site.

Removal actions may be found consistent if they fall anywhere within this range; the most appropriate approach will depend on site-specific factors. It is recognized that in some cases, the removal action may create additional work for the remedial action and yet still be the most appropriate approach for the site. For example, a common removal action is capping contaminated soil to prevent migration and human contact in the time period before remedial actions begin. Although the cap would have to be removed to implement a long-term plan to excavate and treat the soil, it may still be the most effective method to mitigate the threat in the short-term. Protection of public health and the environment, as well as technical feasibility, must always be considered. If such an action is selected, the rationale for selection should be explained in the Action Memorandum for a statutory exemption. (See Section 3.6.)

3.5 Determination of the Remedial Action

This new waiver of the statutory limits requires response personnel to judge the consistency of the removal action in relation to the "remedial action to be taken." If the Record of Decision has already been signed for a remedial action at an NPL site, then comparing the removal action to the remedial cleanup plan is a straightforward task. However, for proposed NPL sites and for many final NPL sites, the remedial action may not have been selected when the removal action is implemented. In these cases, response personnel will be limited to identifying a range of feasible remedial alternatives. To the extent possible, the removal action selected should not preclude any of the feasible remedial alternatives.

A separate written analysis is not required to identify feasible remedial alternatives. Response personnel need only review existing site information and use their best professional judgment. It is the responsibility of removal and remedial personnel in the Regions to coordinate with each other in this effort. The conclusions of this review will be documented in the Action Memorandum, as discussed further in Section 3.6.

Site information for this review may be available from several sources: 1) the remedial site evaluation; 2) the site management plan; 3) the RI/FS, if started; and 4) the Engineering Evaluation/Cost Analysis (EE/CA), which is required for non-time-critical removal actions. (The EE/CA is an analysis of removal options.)

3.6 Documentation and Coordination

To obtain a waiver based on this provision, the Action Memorandum for the exemption request must specifically cite the "otherwise appropriate and consistent with remedial action" criterion and demonstrate how it is satisfied at the site. It would be helpful to reference the site information that was reviewed, and to briefly summarize the information that was most important in making the waiver determination.

To facilitate communication and coordination between the removal and remedial programs, concurrence will be required from a management official from each program. It will be the responsibility of each Region to establish a suitable concurrence chain.

As mentioned earlier, it is also essential for removal and remedial personnel at the staff level to coordinate with each other when selecting the proposed removal action.